

# **The Role of the Senate in Judicial Impeachment Proceedings: Procedure, Practice, and Data**

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## Summary

During the 111<sup>th</sup> Congress, for the first time in over 30 years, the House of Representatives was confronted with the task of investigating and impeaching not one, but two, federal judges. After the House fulfilled its constitutional responsibility as the chamber with the “sole Power of Impeachment,” the Senate was faced with executing its constitutional responsibility to “try all Impeachments.” One of these judges, Samuel B. Kent of the Southern District of Texas, resigned before the Senate could complete his trial. The second, Judge G. Thomas Porteous, Jr., of the Eastern District of Louisiana, chose to contest his impeachment before the Senate. Despite the gravity of this responsibility, the Senate receives little constitutional guidance on how these trials should be conducted. Procedure in the Senate is primarily governed by the special rules established for impeachment trials, precedents established by previous impeachment trials, and existing Senate procedure.

Impeachment trials in the Senate are rare, in that only 12 impeachment trials have been completed over the 222-year history of the Senate, while three others terminated before a determination on the merits of the case due to the resignation of the judges in question. Impeachment trials are also unique, in that each trial presents a wholly complex and individual set of facts and circumstances for the Senate’s consideration. Thus, although this report may provide guidance as to the general structure of the process, each trial presents new procedural, factual, and evidentiary questions that must be resolved by either the full Senate, acting as a Court of Impeachment, or an impeachment trial committee charged with building a record and reporting it to the full Senate.

This report examines the history, practice, and procedures of the Senate in fulfilling its constitutional obligation to try and to vote whether to convict and impose judgment upon judges impeached by the House of Representatives. The first section presents an overview of the impeachment process, including observations on parallels and contrasts between this institutional mechanism and the more familiar criminal judicial process. The second section discusses the rules used by the Senate to structure its proceedings. The third section describes the role of the Senate’s Presiding Officer. The fourth section examines the use of Rule XI committees, otherwise known as impeachment trial committees. Special attention is given to the procedures of the committee during various stages of its proceedings. The fifth and sixth sections address deliberation and judgment by the full Senate, respectively. The seventh section provides a discussion of the length of Senate impeachment trials, examining in particular whether the use of impeachment trial committees have affected the length of Senate trials. The eighth and final section provides some concluding observations on Senate impeachment proceedings against judges.

This report will be updated as events warrant.

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## Introduction

During the 111<sup>th</sup> Congress, for the first time in over 30 years, the House of Representatives was confronted with the task of investigating and impeaching not one, but two, federal judges. After the House fulfilled its constitutional responsibility as the chamber with the “sole Power of Impeachment,”<sup>1</sup> the Senate was faced with executing its constitutional responsibility to “try all Impeachments.”<sup>2</sup> One of these judges, Samuel B. Kent of the Southern District of Texas, resigned before the Senate could complete his trial. The second, Judge G. Thomas Porteous, Jr., of the Eastern District of Louisiana, chose to contest his impeachment before the Senate.<sup>3</sup> Despite the gravity of this responsibility, the Senate receives little constitutional guidance on how these trials should be conducted. Procedure in the Senate is primarily governed by the special rules established for impeachment trials, precedents established by previous impeachment trials, and existing Senate procedure.

This report examines the history, practice, and procedures of the Senate in fulfilling its constitutional obligation to try and to vote whether to convict and impose judgment upon judges impeached by the House of Representatives. The first section presents an overview of the impeachment process, including observations on parallels and contrasts between this institutional mechanism and the more familiar criminal judicial process. The second section discusses the rules used by the Senate to structure its proceedings. The third section describes the role of the Senate’s Presiding Officer. The fourth section examines the use of Rule XI committees,<sup>4</sup> otherwise known as impeachment trial committees. Special attention is given to the procedures of the committee during various stages of its proceedings. The fifth and sixth sections address deliberation and judgment by the full Senate, respectively. The seventh section provides a discussion of the length of Senate impeachment trials, examining in particular whether the use of impeachment trial committees have affected the length of Senate trials. The eighth and final section provides some concluding observations on Senate impeachment proceedings against judges.

## An Overview of the Impeachment Process in the House and Senate

While the judicial branch was designed by the Framers to be independent of political influence, the methods of judicial appointment and removal were designed to be political.<sup>5</sup> The President and the Senate determine who is placed on the bench. The House of Representatives and the

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<sup>1</sup> U.S. Constitution, Art. I, Sec. 2, Cl. 5.

<sup>2</sup> U.S. Constitution, Art. I, Sec. 3, Cl. 6.

<sup>3</sup> The House approved four articles of impeachment against Judge Porteous with the passage of H.Res. 1031, which appears in **Appendix A**.

<sup>4</sup> Rule XI of the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*, which are discussed below.

<sup>5</sup> The removal process is political in at least three respects: “(1) it is political in the originalist sense of the term, insofar as it is a remedy for “political” crimes against the body politic; (2) it is political in the sense of being a process subject to resolution by popular or political majorities, through their representatives in one of the political branches; and (3) it can be political in the sense of being openly partisan.” See Charles Gardner Geyh, *When Courts and Congress Collide: The Struggle for Control of America’s Judicial System* (Ann Arbor, MI: University of Michigan Press, 2006), p. 116. (Hereafter Geyh, *When Courts and Congress Collide*.)

Senate determine who is removed. As both the President and Congress are subject to the approval of the voters, the appointment and removal process is ultimately a political one.

Under Article II, Section 4 of the U.S. Constitution, the President, Vice President, and “all civil Officers of the United States,” including federal judges, may be subject to impeachment by the House and removal by the Senate. Although much of the procedure described in this report is applicable to impeachment proceedings against all civil officers of the United States, this report focuses specifically on history, procedure, and precedent associated with impeachment proceedings against judges. As “civil Officers of the United States,” judges may be impeached and, if convicted, removed for “Treason, Bribery, or other high Crimes and Misdemeanors.”

Treason is defined in the Constitution and in statute. Bribery, while not defined in constitutional language, was an offense at common law and has been defined in statute since the First Congress.<sup>6</sup> The terms “other high Crimes and Misdemeanors” are not defined in the Constitution or in statute, and have been the subject of continuing debate. Judges appointed under Article III of the U.S. Constitution “hold their Offices during good Behaviour.”<sup>7</sup> Although there are differing views, some have suggested that this clause should be read in conjunction with Article II, Section 4, when a federal judge is the focus of an impeachment proceeding. Congressional precedents seem to indicate that both criminal acts and non-criminal acts that violate the public trust may be considered impeachable offenses. The House Judiciary Committee explained in its report on the impeachment of Judge Walter L. Nixon, Jr.:

[t]he House and Senate have both interpreted the phrase broadly, finding that impeachable offenses need not be limited to criminal conduct. Congress has repeatedly defined “other high Crimes and Misdemeanors” to be serious violations of the public trust, not necessarily indictable offenses under criminal laws...<sup>8</sup>

[F]rom a historical perspective, the question of what conduct by a federal judge constitutes an impeachable offense has evolved to the position where the focus is now on public confidence in the integrity and impartiality of the judiciary. When a judge’s conduct calls into question his or her integrity or impartiality, Congress must consider whether impeachment and removal of the judge from office is necessary to protect the integrity of the judicial branch and uphold public trust.<sup>9</sup>

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<sup>6</sup>CRS Report 98-186, *Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice*, by Elizabeth B. Bazan, p. 21. (Hereafter Bazan and Lewis, *Impeachment: An Overview*.)

<sup>7</sup> U.S. Constitution, Art. III, Sec. 1. District court judges located in the 50 states, the District of Columbia, and Puerto Rico; appellate judges located in the 12 geographic circuits and the Federal Circuit; Supreme Court Justices; and judges on the Court of International Trade are all considered to be Article III judges.

<sup>8</sup> Bazan and Lewis, *Impeachment: An Overview*, p. 23, citing U.S. Congress, House Committee on the Judiciary, *Impeachment of Walter L. Nixon, Jr.*, Report to accompany H. Res. 87, 101<sup>st</sup> Cong., 1<sup>st</sup> sess., April 25, 1989, H.Rept. 101-36 (Washington: GPO, 1986), p. 5. (Hereafter *Nixon House Impeachment Report*.)

<sup>9</sup> Bazan and Lewis, *Impeachment: An Overview*, p. 24, citing *Nixon House Impeachment Report*, p. 12.

While impeachment is a political process as delineated in the U.S. Constitution,<sup>10</sup> there are some surface parallels that may be drawn to the criminal judicial process.<sup>11</sup> The House of Representatives possesses the “sole Power of Impeachment.” As a result, the House has discretion to begin impeachment inquiries, conduct investigations into questions of improper behavior that could lead to impeachment, and recommend a course of action. The House’s decision of whether to impeach a judge is somewhat analogous to an indictment, in that the House acts as a grand jury and may impeach by only a majority vote.<sup>12</sup>

Once a judge has been impeached, the Senate is notified. In some respects, the Senate acts similarly to a petit jury<sup>13</sup> and judge by hearing evidence, determining whether to convict on the articles of impeachment transmitted by the House, and, where appropriate, determining what judgment to impose within constitutional limits.<sup>14</sup> Unlike impeachment by the House, however, conviction by the Senate requires a two-thirds vote on any article of impeachment. The Senate may only impose a judgment of removal from office or removal and disqualification from holding “any Office of honor, Trust or Profit under the United States.”<sup>15</sup> In modern practice, conviction on any article of impeachment results in removal from office. If the Senate deems the additional judgment appropriate, it must vote separately, by majority vote, for disqualification from holding office in the future.<sup>16</sup>

An impeachment trial, however, stands wholly separate from a criminal proceeding. Neither impeachment by the House nor conviction by the Senate precludes criminal indictment or conviction on charges related to crimes for which a judge was impeached. As a political process, impeachment and conviction as delineated in the Constitution seek to protect the integrity of American political and judicial institutions. To this point, House managers in a 1989 impeachment trial argued,

Criminal proceedings and impeachment serve fundamentally different purposes: the former is designed to punish an offender and seek retribution, while the latter is the first step in a remedial process. The purpose of impeachment is not personal punishment, but rather to maintain constitutional government through removal of unfit officials from positions of public trust.<sup>17</sup>

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<sup>10</sup> The American impeachment process was modeled, to some degree, on prior English impeachment practice. In the latter, penal sanctions could be imposed upon conviction for any crime or misdemeanor upon any person. In designing a federal constitutional mechanism, the Framers looked with more interest to the colonial experience than to then current impeachment practices in the British Parliament. In contrast, the American impeachment mechanism is restricted in its applicability to specified federal officers. Additionally, unlike the English system, in which the House of Lords was permitted to order any punishment following a conviction, the American system mandated that “[o]nly regular federal courts could take life or limb for crimes, and a Federal official might face trial in these courts whatever the outcome of his impeachment.” Peter Charles Hoffer and N.E.H. Hull, *Impeachment in America, 1635-1805* (New Haven, CT: Yale University Press, 1984), pp. 96-97. See also Bazan and Lewis, *Impeachment: An Overview*, p. 5.

<sup>11</sup> See, for example, Buckner F. Melton, Jr., *The First Impeachment: The Constitution’s Framers and the Case of Senator William Blount* (Macon, GA: Mercer University Press, 1997), pp. 5-6.

<sup>12</sup> For more information on the impeachment process in the House of Representatives, see CRS Report R41110, *The Role of the House of Representatives in Judicial Impeachment Proceedings: Procedure, Practice, and Data*, by Susan Navarro Smelcer and Betsy Palmer.

<sup>13</sup> In the American criminal judicial process, a petit jury, or trial jury, is defined as a “group of citizens who hear evidence presented by both sides at trial and determine the facts in dispute.” Robert A. Carp and Ronald Stidham, *The Federal Courts*, 4<sup>th</sup> ed. (Washington, D.C.: CQ Press, 2001), p. 242.

<sup>14</sup> Geyh, *When Courts and Congress Collide*, p. 116.

<sup>15</sup> U.S. Constitution, Art. I, Sec. 3, Cl. 7.

<sup>16</sup> A flow chart of this process is located in **Appendix B**.

<sup>17</sup> See U.S. Congress, Senate Committee on Rules and Administration, *Procedure for the Impeachment Trial of U.S.*

The procedures and constitutional requirements associated with Senate trials of an impeached judge are less well-defined than those of criminal trials. The Constitution is silent, for example, on whether the person impeached is entitled to counsel, the appropriate involvement of the Executive Branch during impeachment proceedings,<sup>18</sup> and the value of precedent with respect to the structure of the proceedings. Additionally, Senators have not used a standard burden of proof in their deliberations,<sup>19</sup> and rules of evidence are generally ad hoc or absent.<sup>20</sup> While there is little constitutional guidance as to the correct procedures by which to conduct an impeachment trial, the judiciary has shown a great deal of deference to Congress with respect to the methods by which impeachment investigations are conducted and tried.<sup>21</sup> These issues are only a few of the myriad constitutional, practical, and procedural issues surrounding impeachment proceedings in the Senate.<sup>22</sup>

## Rules Governing Senate Impeachment Proceedings

Although the Constitution vests the Senate with the “sole Power” to try all impeachments, it provides little guidance on how the Senate should conduct those trials. The Constitution mandates only that Senators shall be under oath or affirmation when sitting as a Court of Impeachment, that

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*District Judge Alcee Hastings in the United States Senate*, Report to accompany S. Res. 38 and S. Res. 39, 101<sup>st</sup> Cong., 1<sup>st</sup> sess., February 2, 1989, S. Rept. 101-1 (Washington: GPO, 1989), p. 19. (Hereafter *Hastings Procedure*.)

<sup>18</sup> The U.S. Constitution does provide clear guidance that the Executive Branch has no *official* role in impeachment proceedings in the House and the Senate. As discussed above, the House is given the “sole Power of Impeachment,” and the Senate, the “sole Power” to try all impeachments. What is unclear, however, is the extent to which the Executive Branch may attempt to initiate or contribute to an impeachment investigation in the House or trial in the Senate. For example, should attorneys and investigators in the Department of Justice provide materials being collected for an ongoing investigation in which a judge has not yet been indicted? In the case of the House of Representatives, one scholar notes that, prior to the 1980s, the Department of Justice (DOJ) did not provide indictment materials to impeachment investigations due to Separation-of-Powers concerns, to avoid the “perception that politics played a role in the decision to initiate or stall a criminal or impeachment investigation,” and, equally likely, that the DOJ believed that a criminal prosecution would expedite a judge’s resignation more quickly than an impeachment proceeding. Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* (Princeton, NJ: Princeton University Press, 1996), p. 30. (Hereafter Gerhardt, *The Federal Impeachment Process*.)

<sup>19</sup> Scholars have indicated that there is no standard burden of proof used by all Senators. In general, Senators are guided by their conscience. For a more comprehensive discussion of this topic, see CRS Report 98-990, *Standard of Proof in Senate Impeachment Proceedings*, by Thomas B. Ripy; and Gerhardt, *The Federal Impeachment Process*, pp. 40-43.

<sup>20</sup> Gerhardt, *The Federal Impeachment Process*, p. 112. Gerhardt, however, argues that rules of evidence in impeachment proceedings are unnecessary. He states, “Both state and federal courts require special rules of evidence to make trials more efficient and fair to keep certain evidence away from a jury, whose members might not understand or appreciate its reliability, credibility, or potentially prejudicial effect.” Senators, however, are a “sophisticated and politically savvy body,” p. 115. To this point, another scholar, Charles Black, argued, “Senators are in any case continually exposed to ‘hearsay’ evidence; they cannot be sequestered and kept away from newspapers, like a jury. If they cannot be trusted to weigh evidence, appropriately discounting for all the factors of unreliability that have led to our keeping some evidence away from juries, then they are not in any way up to the job, and ‘rules of evidence’ will not help,” quoted by Gerhardt, pp.115-116, from Charles Black, *Impeachment: A Handbook* (New Haven, CT: Yale University Press, 1973), p. 18.

<sup>21</sup> See, e.g., *Nixon v. United States*, 113 S. Ct. 732 (1993), in which the Supreme Court ruled that a challenge to the procedures by which the Senate conducted the impeachment trial of a judge were not reviewable by the courts. In this case, the Supreme Court noted especially that the Constitution gave the Senate the power to try impeachments. As a result, only that institution could determine its rules and procedures. For an extended discussion of judicial decisions related to impeachment, see Bazan and Lewis, *Impeachment: An Overview*, pp. 8-11.

<sup>22</sup> For more information regarding the legal and constitutional issues surrounding the Senate’s exercise of its impeachment powers, see Bazan and Lewis, *Impeachment: An Overview*; and CRS Report RL30042, *Compendium of Precedents Involving Evidentiary Rulings and Applications of Evidentiary Principles from Selected Impeachment Trials*, by Elizabeth B. Bazan et al.



the Chief Justice of the Supreme Court shall preside over the proceedings when the President is being tried, and that “no Person shall be convicted without the Concurrence of two thirds of the Members present.”<sup>23</sup> Additionally, the Constitution limits the scope of the judgment that may be imposed on a judge following conviction by the Senate.

Beyond the Constitution, the Senate relies on its standing rules and supplemental rules, known as the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*, to guide its actions during impeachment trials.<sup>24</sup> The *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials* comprise 26 rules (Rules I-XXVI). These rules provide structure for various aspects of impeachment trials, such as presentation of the articles of impeachment by the House managers (Rule II), the role of the Presiding Officer (Rule V), the recording of proceedings (Rule XIV), and guidelines for Senators who wish to participate in the proceedings (Rule XIX), among other things.

The first impeachment rule was adopted in 1798 prior to the trial of William Blount, a Senator from Tennessee. This rule established the form of the oath to be administered to Senators when sitting as a court of impeachment.<sup>25</sup> The Senate adopted additional rules for the impeachment trials of District Court Judge John Pickering and Supreme Court Justice Samuel Chase in the early 1800s.<sup>26</sup> The current rules were adopted prior to the impeachment trial of President Andrew Johnson in 1868 and have changed little since that time. One of the few revisions to the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*—the creation of the impeachment trial committee—was a result of the 1933 impeachment trial of Judge Harold Louderback. As one scholar noted, “The Louderback proceeding lasted for 76 of the first one hundred days of President Franklin D. Roosevelt’s first term, one of the busiest legislative periods in American history.” Following this trial, at least 40 Senators argued that, given the heavy legislative agenda of the Senate and time-consuming nature of impeachment trials, the process would be better served if the evidence were collected by a committee.<sup>27</sup> Eventually, the Senate passed a resolution authorizing the Senate to create a 12-member committee to receive evidence during impeachment trials. In 1935, this change was incorporated into the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials* as Rule XI. The rules were most recently amended in 1986, when Rule XI was modified to remove the requirement that the trial committee comprise 12 members.<sup>28</sup>

An impeachment trial committee, like the full Senate when meeting as a Court of Impeachment, operates according the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*. When those rules are silent, the Senate has previously determined that both proceedings in the full Senate and the trial committee’s proceedings should be governed by the

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<sup>23</sup> U.S. Constitution, Art. I, Sec. 3, Cl. 6.

<sup>24</sup> During the impeachment trial of President Andrew Johnson, the Chief Justice, as the Presiding Officer, adopted “for his general guidance the rules of the Senate sitting in legislative session as far as they are applicable.” *Hinds’ Precedents*, vol. III, § 2101, p. 432.

<sup>25</sup> This rule was designed to comply with Art. I, Sec. 3, Cl. 6, of the U.S. Constitution, requiring that Senators, when sitting on an impeachment trial, be “on Oath or Affirmation,” and is almost identical to the oath in its current form (Rule XXV). See Asher C. Hinds, *Hinds’ Precedents of the House of Representatives of the United States, Including References to Provisions of the Constitution, the Laws, and Decisions of the United States Senate* (Washington, D.C.: GPO, 1907), vol. III, §2303, p. 653-4. (Hereafter *Hinds’ Precedents*.)

<sup>26</sup> See *Hinds’ Precedents*, vol. III, §§ 2070, 2075, 2078, 2084, 2099, pp. 406, 408, 409, 414, 430; See also, *Hinds’ Precedents*, vol. III, § 2331, pp. 695-696.

<sup>27</sup> Gerhardt, *The Federal Impeachment Process*, p. 34.

<sup>28</sup> *Ibid*.



standing rules of the Senate.<sup>29</sup> This was recognized during the impeachment trial of President Andrew Johnson, when the Chief Justice Salmon Chase justified his ruling on a question of order by stating that “in conducting the business of the court[, he would] adopt...for his general guidance the rules of the Senate sitting in legislative session as far as they are applicable.”<sup>30</sup>

Senate rules may also be supplemented or altered by unanimous consent. For example, in 1986, the Senate agreed by unanimous consent to set time limits on certain portions of impeachment trial proceedings against Judge Harry Claiborne, permitted television cameras to “focus on any person speaking” during the presentation of closing arguments, and provided that the Senate deliberate in closed session.<sup>31</sup>

The *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials* are included in the Senate Manual,<sup>32</sup> as are the standing rules of the Senate.<sup>33</sup> The manual is available from the Government Printing Office (GPO) and is also online at a variety of places, such as the GPO website.<sup>34</sup> The rules are also reprinted in S. Doc. 99-33, *Procedure and Guidelines for Impeachment Trials in the United States Senate (Revised Edition)*.<sup>35</sup> For the remainder of this report, a reference to a Senate rule, such as Rule XI, refers to the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*, not the standing rules.

## Organizing the Senate for Trial

An impeachment trial may commence after the receipt of a message from the House of Representatives, informing the Senate that the House has voted to impeach a judge, adopted articles of impeachment, and appointed House managers for the Senate trial.<sup>36</sup> Historically, the

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<sup>29</sup> U.S. Congress, Senate Committee on Rules and Administration, *Procedure and Guidelines for Impeachment Trials in the United States Senate (Revised Edition)*, Prepared Pursuant to Senate Resolution 439, Submitted by Senator Robert C. Byrd and Senator Robert Dole, by Floyd M. Riddick, Parliamentarian Emeritus of the United States, and Robert B. Dove, Parliamentarian of the United States Senate, 99<sup>th</sup> Cong., 2<sup>nd</sup> sess., August 15, 1986, S. Doc. 99-33 (Washington: GPO, 1986), pp. 74. (Hereafter *Procedure and Guidelines for Impeachment Trials*.) See also U.S. Congress, Senate Special Committee on the Impeachment Trial of Judge Harry E. Claiborne, “Statement of Senator Mathias, Organizational Meeting,” *Report of the Senate Impeachment Trial Committee*, hearings before the Senate Impeachment Trial Committee, 99<sup>th</sup> Cong., 2<sup>nd</sup> sess., August 15, 1986, S. Hrg. 99-812, Pt. 1 (Washington: GPO, 1986), p. 18. (Hereafter *Claiborne Record*.)

<sup>30</sup> *Hinds’ Precedents*, vol. III, §2101, p. 432.

<sup>31</sup> U.S. Congress, Senate, *Riddick’s Senate Procedure: Precedents and Practices*, prepared by Floyd M. Riddick, Parliamentarian Emeritus, and Alan S. Frumin, Parliamentarian, 101<sup>st</sup> Cong., 2<sup>nd</sup> sess., S. Doc. 101-28 (Washington: GPO, 1992), pp. 872-873.

<sup>32</sup> U.S. Senate, Committee on Rules and Administration, “Rules of Procedure and Practice of the Senate When Sitting on Impeachment Trials: Revised pursuant to S. Res. 479, 99-2, Aug. 16, 1986,” *Senate Manual, containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate*, prepared by Matthew McGowan, 110<sup>th</sup> Congress (Washington, D.C.: GPO, 2008), <http://www.gpoaccess.gov/smanual/browse.html>, pp. 170-199. (Hereafter *Rules of Procedure and Practice of the Senate When Sitting on Impeachment Trials*.)

<sup>33</sup> For more information on the standing rules of the Senate, see CRS Report 96-548, *The Legislative Process on the Senate Floor: An Introduction*, by Valerie Heitshusen.

<sup>34</sup> The Senate Manual is available on the GPO website at <http://www.gpoaccess.gov/smanual/browse.html>.

<sup>35</sup> This document, first printed in the 93<sup>rd</sup> Congress, also contains precedent relevant to Senate impeachment trials, including, but not limited to, the adoption of supplementary rules (p. 74), the disqualification of Senators (p. 77), and limitations on the number of witnesses (p. 83).

<sup>36</sup> House managers are charged with presenting the House’s case against the judge during the impeachment trial in the Senate. This role is exemplified in the report submitted by the committee investigating Judge Robert W. Archbald in 1912, in which the committee’s report recommended the presentation of the articles of impeachment to the Senate “with a demand for the conviction [of Judge Archbald] and removal from office.” Clarence Cannon, *Cannon’s*

House took separate votes on one or more of these actions. For example, in the 1862 impeachment of Judge West H. Humphreys, the House first chose to pass a general resolution, which simply stated that Judge Humphreys be impeached of “high crimes and misdemeanors.” Immediately after the passage of this resolution, the House passed another resolution that authorized two Members to go to the bar of the Senate to inform the Senate that the House had found Judge Humphreys guilty of high crimes and misdemeanors and would “in due time exhibit particular articles of impeachment against him.” The House did not report or adopt articles of impeachment against Judge Humphreys or appoint House managers until May 19, 1862, 13 days after the initial impeachment vote.

In modern practice, however, the House has consolidated this process so that the vote to impeach and approve articles of impeachment occur at the same time. For example, the impeachment of Judge Porteous on March 11, 2010, did not require separate votes on whether Judge Porteous should be impeached and whether to approve the articles of impeachment.<sup>37</sup>

After voting on articles of impeachment, the House selects House managers for the Senate impeachment trial. In the case of the impeachment of Judge Porteous, Representative Adam Schiff, chair of the Impeachment Task Force of the House Judiciary Committee, called up a privileged resolution to appoint House managers and asked unanimous consent for its “immediate consideration” by the House.<sup>38</sup> The House has most frequently appointed five Members to argue the House’s case before the Senate, although the number of managers appointed by the House has ranged from three<sup>39</sup> to nine<sup>40</sup> in the 15 instances in which the House voted to impeach a judge. The House has invariably appointed a greater number of Members from the majority party than the minority party. On average, House managers of the majority party comprised about 68%, or roughly two-thirds, of the total number of House managers appointed for each impeachment trial. This proportion is slightly higher than the average percentage of seats held by the majority party in the House (62%) in those Congresses during which articles of impeachment were adopted against a judge. Following the impeachment of Judge Porteous on March 11, 2010, the House passed H.Res. 1165, appointing five Members to serve as House managers for the Porteous impeachment trial. Following historical patterns, three managers were Democrats and two were Republicans.<sup>41</sup>

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*Precedents of the House of Representatives of the United States* (Washington, D.C.: GPO, 1936), vol. VI, §499, p. 686. (Hereafter *Cannon’s Precedents*.)

<sup>37</sup> See Proceedings in the House of Representatives, “Impeachment Judge G. Thomas Porteous,” *Cong. Rec.*, March 11, 2010, pp. H1327-H137.

<sup>38</sup> Proceedings in the House of Representatives, “Appointing and Authorizing Managers for the Impeachment of Judge G. Thomas Porteous,” *Cong. Rec.*, March 11, 2010, p. H1340.

<sup>39</sup> Representatives Hatton Sumners (chairman of the House Judiciary Committee), Randolph Perkins, and Sam Hobbs were appointed by resolution to act as House managers in the impeachment trial of Halsted Ritter in 1936. *Deschler’s Precedents*, Ch. 14, §18.5.

<sup>40</sup> Representatives Peter W. Rodino (chairman of the House Judiciary Committee), Robert W. Kastenmeier, William J. Hughes, Romano Mazzoli, Dan Glickman, Hamilton Fish, Henry Hyde, Thomas Kindness, and Michael DeWine were appointed by resolution to be House managers in the impeachment trial of Harry Claiborne in 1986. “Claiborne Impeached, Stripped of Judgeship,” *CQ Almanac* (Washington, D.C.: CQ Press, 1986), pp. 77-78.

<sup>41</sup> Representatives Adam Schiff (chairman of the House Impeachment Task Force), Bob Goodlatte (Ranking Member of the House Impeachment Task Force), Zoe Lofgren, Henry C. “Hank” Johnson, III, and James Sensenbrenner were appointed by resolution on March 11, 2010, to be House managers in the impeachment trial of Judge Porteous. Proceedings of the House of Representatives, “Appointing and Authorizing Managers for the Impeachment of Judge G. Thomas Porteous, Jr.,” *Cong. Rec.*, March 11, 2010, p. H1340.

The first responsibility of House managers is to verbally impeach the judge before the bar of Senate and demand that the Senate order the judge to appear and face the charges against him.<sup>42</sup> Prior to the House managers' appearance before the Senate, however, the House sends a message informing the Senate of the impeachment and asks the Senate to prepare for trial. The Senate, in return, responds to the House's message with the time at which the House managers should appear before the Senate to present the charges against the impeached judge. Following the House's impeachment of Judge Porteous, pursuant to H.Res. 1165, a message notifying the Senate of the impeachment was delivered on March 15, 2010. The Senate replied the same day, indicating that it would be ready to receive the House managers on March 17, 2010, at 2:00 p.m., "in order that they may present and exhibit the said articles of impeachment against the said G. Thomas Porteous, Judge of the United States District Court for the Eastern District of Louisiana."<sup>43</sup>

After the House managers are received by the Senate and present the articles of impeachment, all Senators must be sworn as a Court of Impeachment. The swearing of all Senators is performed to fulfill a constitutional requirement that, when sitting for the purpose of trying an impeachment, the Senators will "be on Oath or Affirmation."<sup>44</sup> First, the oath must be by tradition administered to the Presiding Officer by a Senator selected by body at large. During the Porteous impeachment, the majority leader proposed that the minority leader administer the oath to the Presiding Officer, to which the Senate agreed. After taking the oath, the Presiding Officer then administered the oath to the rest of the Senate. A Senator may seek to be excused from service in the Court of Impeachment.<sup>45</sup> The oath may also be administered to absent Senators at a later date.<sup>46</sup> According to Rule XXV of the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*, each Senator is sworn in as a juror with the following oath:

I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of [impeached judge], now pending, I will do impartial justice according to the Constitution and laws: So help me God.

Following the taking of the oath, the Senate issues a summons to the impeached judge to respond to, or "answer," the articles of impeachment presented by the House. The Senate then sets a time within which the House managers may respond to the impeached judge's answer with a "replication." A replication is a written response to the judge's answer to the charges in the articles of impeachment. As noted by scholars, a replication "usually consists of a general denial

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<sup>42</sup> Warren S. Grimes, "The Role of the U.S. House of Representatives in Proceedings to Impeach and Remove Federal Judges," in *Research Papers of the National Commission on Judicial Discipline and Removal*, vol. 1 (Washington, D.C.: 1993), p. 64. (Hereafter Grimes, *The Role of the House of Representatives in Proceedings to Impeach and Remove Federal Judges*.) In the most recent impeachment, the Senate passed S.Res. 457, which ordered that a "summons shall be issued which commands G. Thomas Porteous, Jr., to file with the Secretary of the Senate an answer to the articles of impeachment no later than April 7, 2010, and thereafter to abide by, obey, and perform such orders, directions, and judgments as the Senate shall make in the premises, according to the Constitution and laws of the United States." Proceedings of the Senate, "Issuance of a Summons and for Related Procedures Concerning the Articles of Impeachment Against G. Thomas Porteous, Jr.," *Cong. Rec.*, March 17, 2010, p. S1647.

<sup>43</sup> Proceedings in the Senate, "Order for Exhibiting Articles of Impeachment Against G. Thomas Porteous, Jr.," *Cong. Rec.*, March 15, 2010, p. S1562.

<sup>44</sup> U.S. Constitution, Art. I, Sec. 3, Cl. 6.

<sup>45</sup> Proceedings in the Senate, "Exhibition of Articles of Impeachment Against G. Thomas Porteous, Judge of the United States District Court for the Eastern District of Louisiana," *Cong. Rec.*, March 17, 2010, p. S1644-1646.

<sup>46</sup> For example, when the Senate organized for the trial of Walter L. Nixon, several Senators were absent and failed to have the oath administered to them. Five days later, these Senators were sworn in by the President pro tempore. Proceedings in the Senate, "Oath Administered Regarding Impeachment Trial of Walter L. Nixon," *Cong. Rec.*, May 16, 1989, pp. S5316-S5317.

of all allegations set forth in the respondent's answer,"<sup>47</sup> and serves to narrow the issues to be addressed in the impeachment trial.

The summons is presented in the form of a resolution that, among other things, charges the Sergeant at Arms with serving the summons, indicates the date by which the judge must answer the articles of impeachment, and provides the date by which the House managers may file a replication.<sup>48</sup> While organizing for the Porteous impeachment, immediately after taking the oath, the Senate passed S.Res. 457, which provided for the "issuance of a summons and for related procedures concerning the articles of impeachment."<sup>49</sup> The Senate similarly moved to summon impeached judges immediately after the administration of the oath when organizing for the impeachment trials of Judges Harry Claiborne,<sup>50</sup> Alcee Hastings,<sup>51</sup> and Walter Nixon, Jr.<sup>52</sup>

## The Role of the Presiding Officer

The Presiding Officer of the Senate presides over a Court of Impeachment.<sup>53</sup> Formally, the Presiding Officer is the Vice President acting in his capacity as the President of the Senate, as then Vice President George H.W. Bush did at the beginning of the impeachment trial of Judge Claiborne in 1986.<sup>54</sup> However, the President pro tempore may also fill this role in the absence of the Vice President. Additionally, the Senate may through a special order provide for an alternate Presiding Officer in the absence of the Vice President and the President pro tempore. For example, during the impeachment trial of Harold Louderback in 1933, the Senate adopted the following order:

*Ordered*, That during the trial of the impeachment of Harold Louderback, United States district judge for the northern district of California, the Vice President, in the absence of the President pro tempore, shall have the right to name in open Senate, sitting for the said trial, a Senator to perform the duties of the Chair.

The President pro tempore shall likewise have the right to name in open Senate, sitting for said trial, or, if absent, in writing a Senator to perform the duties of the Chair; but in such

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<sup>47</sup> Edwin Brown Firmage and R. Collin Mangrum, "Removal of the President: Resignation and the Procedural Law of Impeachment," *Duke Law Journal*, vol. 1974, p. 1055.

<sup>48</sup> Pursuant to Rule VIII of the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*, the summons is issued "upon the presentation of articles of impeachment and the organization of the Senate" as a Court of Impeachment.

<sup>49</sup> "Providing for issuance of a summons and for related procedures concerning the articles of impeachment against G. Thomas Porteous, Jr.," *Cong. Rec.*, March 17, 2010, p. S1646.

<sup>50</sup> U.S. Congress, Senate, *Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne, A Judge of the United States District Court for the District of Nevada*, "S. Res. 481: To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Harry E. Claiborne," 99<sup>th</sup> Cong., 2<sup>nd</sup> sess., October 15, 1986, S. Doc. 99-48, pp. 6-7. (Hereafter *Claiborne Proceedings*.)

<sup>51</sup> Proceedings in the Senate, "Impeachment of Judge Alcee L. Hastings, Introduction of S. Res. 456," *Cong. Rec.*, vol. 134, August 9, 1988, p. 21171.

<sup>52</sup> Proceedings in the Senate, "Impeachment of Judge Walter L. Nixon, Jr.," *Cong. Rec.*, vol. 135, pt. 7, May 11, 1989, p. S5131.

<sup>53</sup> The role and responsibilities of the Presiding Officer during an impeachment trial are delineated by Rules III, V, VII, XI, XVI, XIX, XXIII, XXIV, and XXV of the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*.

<sup>54</sup> Proceedings in the Senate, "Impeachment of Judge Harry E. Claiborne," *Cong. Rec.*, vol. 132, August 6, 1986, p. S10535.

substitution in the case of either the Vice President or the President pro tempore shall not extend beyond an adjournment or recess, except by unanimous consent.<sup>55</sup>

## Use of an Impeachment Trial Committee

### Organization and Responsibilities of the Committee

Prior to the impeachment of Judge Porteous, the House had impeached 14 judges and Justices. Of these 14, the Senate has completed the trials of 11 (see **Table 1**).<sup>56</sup> From the Senate's first judicial impeachment trial in 1805, in which the Senate removed Judge John Pickering from office, through its 1936 conviction of Judge Halsted Ritter, the Senate resolved itself into a Court of Impeachment, in which the entire body heard evidence and arguments for and against the conviction of the judge. Although first adopted by the Senate in 1935 following the impeachment trial of Judge Harold Louderback, the Senate did not invoke Rule XI of the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials* to form an impeachment trial committee until its trial of Judge Claiborne in 1986.<sup>57</sup>

An impeachment trial committee is charged with receiving evidence and taking testimony on behalf of the entire Senate. The trial committee must report "to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and taken" by the committee. This record may be hundreds or thousands of pages long. The committee is also responsible for providing a factual summary of the evidence, if directed to do so by the Senate,<sup>58</sup> which it did in the trials of Judges Hastings (1988-1989), Nixon (1989), and Porteous (2010). According to Rule XI, these proceedings are open to the public. The committee makes no recommendation as to the merits of the case or its final outcome.

A committee is typically formed by resolution after the issuance of the summons. Through the authorizing resolution, the Senate may as it sees fit grant to or withhold authority from the committee. While organizing for the trial of Judge Porteous, the Senate approved S.Res. 458, providing for the appointment of an impeachment trial committee, immediately after issuing the

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<sup>55</sup> *Senate Journal*, 73<sup>rd</sup> Congress, 1<sup>st</sup> sess., May 15, 1933, p. 328.

<sup>56</sup> Three other Senate impeachment trials involving federal judges were commenced but terminated before a decision on the merits because the judge in question resigned. These three judges were Mark H. Delahay of the U.S. District Court for the District of Kansas; George W. English of the U.S. District Court for the Eastern District of Illinois; and Samuel B. Kent of the U.S. District Court for the Southern District of Texas.

<sup>57</sup> Rule XI, as adopted on May 28, 1935, was amended prior to the Hastings trial in 1986. The Senate changed language that would require the Senate to explicitly order the committee to take evidence. Additionally, the Senate removed the requirement that the committee be composed of 12 Senators so that the Senate could set the membership of the committee "in accord with the needs of the situation." See a memo submitted August 30, 1988, by Jay R. Shampansky, Legislative Attorney, Congressional Research Service, reprinted in *Hastings Procedure*, pp. 50-51.

<sup>58</sup> U.S. Congress, Senate Impeachment Trial Committee, *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings*, "S. Res. 38: Committee Established to Receive and Report Evidence with Respect to Articles of Impeachment Against Judge Alcee L. Hastings," 101<sup>st</sup> Cong., 1<sup>st</sup> sess., S. Hrg. 101-194, Pt. 1 (Washington: GPO, 1989), pp. 4-6 (hereafter *Hastings Record*); U.S. Congress, Senate Impeachment Trial Committee, *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr.*, "S. Res. 128: Committee Established to Receive and Report Evidence With Respect to Articles of Impeachment Against Judge Walter L. Nixon, Jr.," 101<sup>st</sup> Cong., 1<sup>st</sup> sess., S. Hrg. 101-247, Pt. 1, pp. 1-5 (Hereafter *Nixon Record*); U.S. Congress, Senate Impeachment Trial Committee, *Hearings Before the Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr.*, "S. Res. 458: To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Judge G. Thomas Porteous, Jr.," 111<sup>th</sup> Cong., 2<sup>nd</sup> sess., S. Hrg. 111-691, vol. 1, pt. A, pp. 15-17 (hereafter *Porteous Record*).



summons.<sup>59</sup> This resolution, and similar resolutions passed by the Senate while organizing for the impeachment trials of Judges Hastings and Nixon, included provisions that the membership of the committee comprise 12 members (six from each party).<sup>60</sup> This resolution also provided that the committee be regarded as a standing committee of the Senate for “the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee’s subpoenas or orders,” authorized the committee to employ staff and consultants, and ordered the committee to report a statement of uncontested facts, as well as a summary. Additionally, S.Res. 458 granted the chair of the Rule XI committee the authority to “waive the requirement *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials* that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the Presiding Officer.”

In modern practice, resolutions authorizing the creation of impeachment trial committees have included a provision allowing the Presiding Officer to appoint 12 members to an impeachment trial committee. Originally, Rule XI included a provision that required the committee to have 12 members, with its membership evenly split between Democrats and Republicans. Although this provision was removed in 1986, in each of the instances in which the Senate has employed a Rule XI committee, the Presiding Officer has appointed six Democrats and six Republicans, upon the recommendation of the majority and minority leaders.<sup>61</sup> The chair and vice chair of this committee may either be recommended by the majority and minority leaders of the Senate, respectively, and approved by the Senate, or selected by the committee themselves by majority vote.<sup>62</sup>

Once appointed, the impeachment trial committee is responsible for all organizational and administrative aspects of the pre-trial and evidentiary phases of the impeachment trial, pursuant to its authorizing resolution. In the past, these logistics have been managed by a counsel chosen from the Senate Legal Counsel’s office, who works closely with the chair and vice chair. The resolution authorizing the creation of the Rule XI committee in the proceedings against Judge Porteous permits the committee to employ staff and consultants with the prior approval of the Committee on Rules and Administration.<sup>63</sup> Additionally, the committee works with the House managers and the judge’s counsel to determine an appropriate timeline for the proceedings.

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<sup>59</sup> Proceedings in the Senate, “Providing for the Appointment of a Committee to Receive and to Report Evidence with Respect to Articles of Impeachment Against Judge G. Thomas Porteous,” *Cong. Rec.*, March 17, 2010, p. S1647.

<sup>60</sup> Ibid. See also “S. Res. 38: To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Alcee L. Hastings,” *Hastings Record*, Pt. 1, pp. 4-6; and “S. Res. 128: To Provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Judge Walter L. Nixon, Jr.,” *Nixon Record*, Pt. 1, pp. 3-5.

<sup>61</sup> Proceedings in the Senate, “Appointment of an Impeachment Trial Committee,” *Cong. Rec.*, June 24, 2009, p. S6961; *Claiborne Proceedings*, p. 13. *Hastings Record*, Pt. 1, p. 7; *Nixon Record*, Pt. 1, p. 7.

<sup>62</sup> In the case of the Senate’s impeachment trial proceedings against Judge Samuel Kent, the majority and minority leaders recommended a chair and vice chair of the committee – a recommendation which was then adopted by the Presiding Officer. Proceedings in the Senate, “Appointment of an Impeachment Trial Committee,” *Cong. Rec.*, June 24, 2009, p. S6961.

<sup>63</sup> Specifically, S.Res. 458 states, “The actual and necessary expenses of the committee, including the employment of staff at an annual rate of pay, and the employment of consultants with prior approval of the Committee on Rules and Administration at a rate not to exceed the maximum daily rate for a standing committee of the Senate, shall be paid from the contingent fund of the Senate from the appropriation account “Miscellaneous Items” upon vouchers approved by the chairman of the committee, except that no voucher shall be required to pay the salary of any employee who is compensated at an annual rate of pay.”

## Procedure During the Preliminary Phase of Its Proceedings

Both the House managers and the impeached judge file pretrial motions according to a timeline determined by the committee, which may include (1) motions that the full Senate should hear all or part of the evidence,<sup>64</sup> (2) motions for the dismissal of an article of impeachment,<sup>65</sup> (3) admission of the testimony of a witness from a prior proceeding (e.g., a prior criminal proceeding),<sup>66</sup> (4) motions for defense funds,<sup>67</sup> (5) motions to immunize witnesses,<sup>68</sup> or (6) stipulations to uncontested facts.<sup>69</sup>

The impeachment trial committee entertains arguments on these motions during a hearing or hearings held specifically to dispose of pretrial motions. According Rule XXI of the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*, “[a]ll preliminary or interlocutory questions, and all motions, shall be argued for not exceeding one hour (unless the Senate otherwise orders) on each side.” The committee may choose to defer a ruling on a motion to the full Senate,<sup>70</sup> rule on the motions during the hearing, or choose to deliberate and issue an order at a later date. For example, in the case of the Judge Nixon’s impeachment trial, the judge filed a pretrial motion requesting the Senate to reimburse him for attorneys’ fees at \$75 per hour and out-of-pocket expenses. During the July 13, 1989, pretrial hearing, the committee entertained arguments on this motion. After deliberating for 12 days, the committee issued its “First Order,” in which it rejected Nixon’s request for the reimbursement of his defense costs, but allowed for reasonable per diem and travel expenses for Judge Nixon’s witnesses called before the committee.<sup>71</sup>

In the past, the committee has required House managers and the impeached judge to submit pretrial statements, which generally included (1) factual summaries of the case, (2) arguments for or against the articles of impeachment, (3) exhibits to be entered into the record, and (4) a list of witnesses and the purpose for their testimony. The committee may choose to use orders to clarify requirements for pretrial statements, as well as to encourage the parties to cooperate more fully on discovery issues or factual stipulations.<sup>72</sup>

## Procedure During the Evidentiary Phase of Its Proceedings

After the committee has disposed of pretrial motions and each party has submitted a pretrial statement, the impeachment trial committee begins its evidentiary hearings. These hearings begin

<sup>64</sup> See “Judge Nixon’s Motion for Trial by Senate (June 23, 1989),” and “Memorandum in Support for Judge Nixon’s Motion for Trial by Senate (June 23, 1989),” in *Nixon Record*, Pt. 1, pp. 93-116.

<sup>65</sup> See “Judge Nixon’s Motion to Dismiss Impeachment Article III (June 23, 1989),” and “Memorandum in Support of Judge Nixon’s Motion to Dismiss Impeachment Article III (June 23, 1989)” in *Nixon Record*, Pt. 1, pp. 121-152.

<sup>66</sup> See, e.g., “House Managers’ Proposed Use of Prior Testimony (June 15, 1989),” *Hastings Record*, Pt. 1, pp. 757-766.

<sup>67</sup> See, e.g., “Judge Alcee L. Hastings’ Motion Requesting Funds for Respondent’s Defense (March 30, 1989); printed in the Congressional Record – Senate, and referred to the Committee (April 4, 1989)” and “Memorandum of House Managers Regarding the Application of the Compensation Clause of the U.S. Constitution to Respondent’s Request for Defense Funds (April 7, 1989)” in *Hastings Record*, Pt. 1, pp. 203-218.

<sup>68</sup> See, e.g., “Immunization of Witness Testimony,” *Nixon Record*, Pt. 1, pp. 623-646.

<sup>69</sup> See, e.g., “House of Representatives’ Proposed Stipulation of Facts,” *Nixon Record*, Pt. 1, pp. 173-194.

<sup>70</sup> For example, any pretrial motion that seeks to dismiss an article of impeachment may be properly considered by the full Senate because such a ruling would involve the final disposition of an article.

<sup>71</sup> See “First Order,” in *Nixon Record*, Pt. 1, pp. 319-326.

<sup>72</sup> See, for example, “Second Order,” in *Nixon Record*, Pt. 1, pp. 341-347.



with opening statements by, first, the House managers and then by the impeached judge or the impeached judge's counsel. Precedents indicate that an opening statement is presented "for the purpose of outlining what is expected to be proved."<sup>73</sup> The introduction of evidence or questioning of witnesses during this phase of the proceedings has not been allowed.

Traditionally, the Senate has adopted orders that required that the opening statements of each party be made by one person as provided by Rule XXII of the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*.<sup>74</sup> For example, in the impeachment trial of Halsted L. Ritter in 1936, the Senate entered an order that "the opening statement on the part of the managers shall be made by one person, to be immediately followed by one person who shall make the opening statement on behalf of the respondent."<sup>75</sup> A House manager, not counsel, has traditionally made the opening statement on behalf of the House of Representatives. An impeached judge, traditionally, has been represented by counsel.<sup>76</sup> According to Rule XXII of the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*, the first opening statement and last closing argument are made by the House managers.

After opening statements, the committee begins by calling the witnesses summoned at the request of the House managers. These witnesses are first subject to direct examination by a House manager or House managers' counsel.<sup>77</sup> After the House manager has completed his or her questioning, the judge's counsel is afforded the opportunity to cross-examine<sup>78</sup> the witness. According to Senate rules, "witnesses shall be examined by one person on behalf of the party producing them, and then cross-examined by one person on the other side."<sup>79</sup> After the House managers' witnesses have testified, the impeached judge is permitted to call witnesses. Like the House managers, the counsel for the impeached judge engages in a direct examination of the witness, which is followed by a cross-examination by a House manager or House managers' counsel.

Although not mandated by Senate rules, House managers or either party's counsel may be permitted by the committee to engage in a redirect examination<sup>80</sup> and a recross examination<sup>81</sup> of

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<sup>73</sup> *Procedure and Guidelines for Impeachment Trials*, p. 62.

<sup>74</sup> Similar orders were also adopted during the Senate impeachment proceedings against Judge Robert Archbald (1913) and Harold Louderback (1933). *Procedure and Guidelines for Impeachment Trials*, p. 62.

<sup>75</sup> *Procedure and Guidelines for Impeachment Trials*, p. 62. See also Rule XXII of the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*, which states, "The case, on each side, shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives."

<sup>76</sup> For example, during the Nixon impeachment trial, the opening statement for the House of Representatives was delivered by Representative Don Edwards. The opening statement for Judge Nixon was delivered by David O. Stewart, the judge's counsel. "Opening statement on behalf of House managers" and "Opening statement on behalf of Judge Walter L. Nixon, Jr.," *Nixon Record*, pp. 2-16.

<sup>77</sup> A direct examination is "[t]he first questioning of a witness in a trial or other proceeding, conducted by the party who called the witness." *Black's Law Dictionary*, ed. Bryan A. Garner, 7<sup>th</sup> ed. (St. Paul, MN: West Group, 2000), p. 371. (Hereafter *Black's Law Dictionary*.)

<sup>78</sup> A cross examination is "[t]he questioning of a witness at a trial or hearing by the party opposed to the party who called the witness to testify, [in order to] discredit a witness before the fact-finder ..." *Black's Law Dictionary*, p. 312.

<sup>79</sup> Rule XVII, *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*.

<sup>80</sup> A redirect examination is a "second direct examination, after cross-examination, [whose] scope is ordinarily limited to matters covered during cross-examination." *Black's Law Dictionary*, p. 1026.

<sup>81</sup> A recross examination is a "second cross-examination, after a redirect examination." *Black's Law Dictionary*, p. 1025.

the witness. For example, in evidentiary hearings conducted during impeachment proceedings against Judge Nixon, House managers were permitted to conduct redirect examinations of all four of their witnesses. Following the redirect examination of two of these four witnesses, Judge Nixon's counsel engaged in a recross examination. Additionally, in some instances, such as during the evidentiary hearings in the impeachment trial of Harry E. Claiborne, counsel were permitted to object to questions posed by opposing counsel during the questioning of a witness.<sup>82</sup>

After the House managers or both party's counsels have completed their questioning, individual Senators may submit questions to the witness for any purpose. For example, a Senator may wish to question the witness or ask the witness to clarify a response. Rule XIX specifies that "[i]f a Senator wishes a question to be put to a witness, or to a manager, or to the counsel of a person impeached ... , it shall be reduced to writing, and put by the Presiding Officer." In two of the three most recent impeachment trials, however, the trial committee pursuant to the authorizing resolution has permitted direct oral questioning of the witnesses by Senators. The only trial during which the committee's examination of witnesses was conducted according to Rule XIX, in which Senators submitted questions in writing to the chair of the committee, was that of Judge Claiborne. Additionally, the rule states that colloquy is not in order.<sup>83</sup>

## Submitting a Report to the Full Senate

After all evidence has been received and all testimony taken, the committee submits a written report to the full Senate. Typically, this report has contained copies of the Senate resolutions authorizing the committee or passed in relation to the committee's work, transcripts of committee's pretrial and evidentiary hearings, correspondence received by the committee from the counsel for either party, reproductions of any orders issued by the committee, and copies of letters sent by the chair and vice chair to agencies or individuals to request information. The report has also included copies of any exhibits entered into the record by either party. Exhibits may include, but are not limited to, telephone records,<sup>84</sup> copies of payments made by check,<sup>85</sup> newspaper articles,<sup>86</sup> pages from personal calendars,<sup>87</sup> and financial disclosure statements.<sup>88</sup> This report may run thousands of pages long. No impeachment trial committee has been authorized to make a recommendation on any article of impeachment.

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<sup>82</sup> According to Rule XIX, "[t]he parties or their counsel may interpose objections to witnesses answering questions propounded at the request of any Senator and the merits of any such objection may be argued by the parties or their counsel." In these cases, counsel will be permitted to continue a direct or redirect examination of a witness for the sake of clarification. See, for example, objections made by Nicholas D. Chabreja, on behalf of the House managers, during the cross-examination of William L. Wilson during the Sept. 15, 1986, evidentiary hearing. *Claiborne Record*, pp. 610-611.

<sup>83</sup> Colloquy, or a scripted exchange between a Senator and a committee chair or between Senators, is generally used to clarify the intent of a legislative provision or a resolution. For an example of how a colloquy may be used, see CRS Report RL30881, *Senate Organization in the 107<sup>th</sup> Congress: Agreements Reached in a Closely Divided Senate*, by Elizabeth Rybicki.

<sup>84</sup> See, for example, "Telephone bills for (305) 945-9939, residence line for William Dredge," in *Hastings Record*, Pt. 3B, pp. 163-183.

<sup>85</sup> See, for example, "Committee Exhibit No. 10: Note Payments by Nixon," *Nixon Impeachment*, Pt. 4B, pp. 87-99.

<sup>86</sup> See, for example, "House managers' Exhibit No. 231: Newspaper article, *Miami Herald*, "Stadium foes question Clark's role," *Hastings Record*, p. 1966.

<sup>87</sup> See, for example, "Respondent Exhibit No. 102: Personal diary of Judge Hastings, September 30-October 6, 1981," *Hastings Record*, Pt. 3B, pp. 2794-2825.

<sup>88</sup> See, for example, "Hearing Exhibit No. 13: Original 1981 Nixon financial disclosure statement, amended statement and letter from Judge Tamm to Nixon, June 18, 1982," *Nixon Record*, Pt. 4B, vol. 3, pp. 476-482.

## Deliberation by the Full Senate

After the printing of the impeachment trial committee's report, the Senate considers the committee's summary, if present, and the record of evidence.<sup>89</sup> According to Rule XI, any evidence received or testimony taken by the committee and submitted to the full Senate "shall be considered to all intents and purposes, subject to the right of the Senate to determine competency,<sup>90</sup> relevancy,<sup>91</sup> and materiality."<sup>92</sup> Any motions regarding these issues may be decided by the Presiding Officer, although a Senator may request that a motion be put to a vote.<sup>93</sup> Additionally, the Senate is permitted to call any witness to testify, regardless of whether that same witness testified before the impeachment trial committee.<sup>94</sup>

This stage of the Senate's impeachment proceedings against a judge commence with a closing statement made by the House managers. Unlike opening statements presented before the impeachment trial committee, closing statements may be presented by more than one individual for each party.<sup>95</sup> During the Nixon impeachment trial in 1989, for example, the closing argument for the House of Representatives was divided between three managers.<sup>96</sup>

After closing statements are delivered for both parties, Senators have the opportunity to submit questions to the House managers and impeached judge's counsel. According to Rule XIX, questions posed by Senators during this phase are required to be submitted in writing to the Presiding Officer. The content of the questions posed by Senators following closing statements have addressed topics including, but not limited to, the structure of the articles of impeachment,<sup>97</sup>

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<sup>89</sup> For a discussion of precedents involving evidentiary rulings in prior impeachment trials, see CRS Report RL30042, *Compendium of Precedents Involving Evidentiary Rulings and Applications of Evidentiary Principles from Selected Impeachment Trials*, by Elizabeth B. Bazan et al.

<sup>90</sup> Competency refers to "the presence of those characteristics, or the absence of those disabilities, which render the witness legally fit and qualified to give testimony." For example, a question might arise with regard to whether a witness has the personal knowledge or expertise to address the matter at issue. The term may also apply to the authenticity of documents or other written evidence. *Black's Law Dictionary*, ed. Joseph R. Nolan and Jacqueline M. Nolan-Haley, 6<sup>th</sup> ed. (St. Paul, MN: West Group, 2000), p. 283.

<sup>91</sup> The relevancy of evidence refers to whether evidence is logically connected to the articles under consideration and has "appreciative probative value – that is, rationally tending to persuade people of the probability or possibility of some alleged fact." *Black's Law Dictionary*, 7<sup>th</sup> ed., p. 1035.

<sup>92</sup> If evidence is material, it means that it has some bearing on proving or disproving a fact that would make a charge against a judge more or less likely to be true. *Black's Law Dictionary*, 7<sup>th</sup> ed., p. 793.

<sup>93</sup> Rule VII, *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*.

<sup>94</sup> Rule XI, *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*.

<sup>95</sup> Specifically, Rule XXII of the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials* provides, in pertinent part, that closing arguments on the merits "may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives."

<sup>96</sup> The first section of the closing argument, presented by Representative Don Edwards, discussed the House's efforts in amassing a factual record and provided an overview of the alleged conduct that led to Judge Nixon's criminal conviction and the articles of impeachment against him. The second section, delivered by Representative James Sensenbrenner, focused on two questions: (1) "Does the conduct alleged in the three articles impeachment state an impeachable offense?" and (2) "Did the conduct occur?" The final section, argued by Representative Benjamin Cardin, spoke to motions filed by Judge Nixon, among other things. Proceedings in the Senate, "Impeachment of Judge Walter L. Nixon, Jr.," *Cong. Rec.*, 101<sup>st</sup> Cong., 1<sup>st</sup> sess., November 1, 1989, pp. S14493-S14498.

<sup>97</sup> See, for example, Senator Herb Kohl's question regarding the structure of the third article of impeachment against Judge Walter L. Nixon, Jr. Proceedings in the Senate, "Impeachment of Judge Walter L. Nixon, Jr.," *Cong. Rec.*, 101<sup>st</sup> Cong., 1<sup>st</sup> sess., November 1, 1989, pp. S14513.

counsels' suggestions as to an appropriate standard of proof,<sup>98</sup> the House managers' opinions on the logical conclusions to be drawn from the evidence,<sup>99</sup> and whether a criminal prosecution is relevant to impeachment proceedings.<sup>100</sup>

Following a period of questioning, the Senate generally begins a period of deliberation on the articles. Rule XX states that “[a]t all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions.”<sup>101</sup> While proceedings before the impeachment trial committee generally follow this rule, the deliberation by the full Senate prior to voting on articles of impeachment has traditionally occurred in a closed session. In the three most recent trials, the determination of when to move into closed session has occurred pursuant to a unanimous consent agreement.<sup>102</sup>

At any time following the closing arguments, but prior to the vote on the first article of impeachment, the Senate may choose to consider any motions deferred to the full Senate by the committee or renewed by either the House managers or the impeached judge. During the trial of Judge Nixon, the Senate chose to hear such motions after deliberation in closed session, including motions to dismiss the third article of impeachment and for a trial by the full Senate.<sup>103</sup>

## Judgment by the Full Senate

Following deliberation and consideration of any remaining motions, the full Senate votes on the articles of impeachment. The Senate must vote separately on each article,<sup>104</sup> a Senate practice since the first impeachment of a federal judge in 1804. Additionally, according to Senate rules, articles of impeachment are not divisible.<sup>105</sup> Additionally, Rule XXIII requires that “voting [on

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<sup>98</sup> See, for example, a question submitted by Senator Joseph Lieberman to the House managers following closing arguments in the Senate’s trial of Judge Alcee Hastings. Senator Lieberman asked, “Assuming for the sake of argument that the Senate votes to acquit Judge Hastings on Articles I to XVI, must the Senate also necessarily vote to acquit him on Article XVII? If no, what standard of proof do you urge us to apply in judging Article XVII, the ‘omnibus’ article, and why should it be different or yield a different result than for Articles I to XVI?” Proceedings in the Senate, “Impeachment of Judge Alcee L. Hastings,” *Cong. Rec.*, 101<sup>st</sup> Cong., 1<sup>st</sup> sess., October 18, 1989, p. S13636.

<sup>99</sup> See, for example, the questions submitted by Senators Harry Reid and Steven Symms to the House managers in the Senate proceedings against Judge Walter L. Nixon, Jr. Proceedings in the Senate, “Impeachment of Judge Walter L. Nixon, Jr.,” *Cong. Rec.*, 101<sup>st</sup> Cong., 1<sup>st</sup> sess., November 1, 1989, p. S14514.

<sup>100</sup> See, for example, the question posed by Senator Carl Levin to the House managers. *Ibid.*

<sup>101</sup> The rule continues, “A motion to close the doors may be acted upon without objection, or, if objection is heard, the motion shall be voted on without debate by the yeas and nays, which shall be entered on the record.” See Rule XX, *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*.

<sup>102</sup> In two of the past three previous impeachment trials, a Senator offered a unanimous consent request to deliberate in closed session the day prior to Senate deliberations. Proceedings in the Senate, “Court of Impeachment Schedule [in the trial of Harry E. Claiborne],” *Cong. Rec.*, 99<sup>th</sup> Congress, 2<sup>nd</sup> sess., October 6, 1986, pp. 29083-29084; Proceedings in the Senate, “Impeachment of Judge Alcee L. Hastings,” *Cong. Rec.*, 101<sup>st</sup> Cong., 1<sup>st</sup> sess., October 18, 1989, p. S13638. During Judge Nixon’s trial, however, the unanimous consent request to conduct deliberations in closed session was submitted a week before the trial began. Proceedings in the Senate, “Unanimous Consent Agreement – Impeachment Proceedings Against Judge Walter L. Nixon, Jr.,” *Cong. Rec.*, 101<sup>st</sup> Congress, 1<sup>st</sup> sess., October 26, 1989, p. S14202.

<sup>103</sup> See, e.g., “Supplemental Motion for Full and Fair Impeachment Trial Before the Entire Senate of the United States, or in the Alternative, Dismissal,” *Nixon Record*, Pt. 1, pp. 56-63.

<sup>104</sup> Rule XXIII, *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*.

<sup>105</sup> Rule XXIII, *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*. Note, however, that in one instance during the trial of Judge West Humphreys, an article of impeachment was divided into three sections at the suggestion of a Senator. One of these sections was rejected by a 12-14 vote. *Hinds’ Precedents*, vol. III, §2397, p. 818.

the articles of impeachment] shall be continued until voting has been completed on all articles of impeachment.” After this process begins, the Senate cannot adjourn for more than one day. The Senate may, however, adjourn *sine die*.<sup>106</sup>

Unlike deliberation by the full Senate, nothing in the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials* allows votes to be taken in closed session. To the contrary, Rule XX and Rule XXIV indicate that the only time the Senate is permitted to proceed in closed session is during deliberation. In each of the 11 full impeachment trials of federal judges in which votes were taken on articles of impeachment, the Senate voted in open session. Notably, during the impeachment trial of Judge Robert Archbald in 1913, after a Senator proposed a motion to proceed in closed session while voting on articles of impeachment, the Presiding Officer explained, “There will be no vote taken in closed session; there cannot be.”<sup>107</sup>

Voting on each article is done by rollcall. The Presiding Officer first states the question, and each Senator stands at his seat and votes “guilty” or “not guilty.”<sup>108</sup> A judge is deemed to have been convicted in an impeachment trial if two-thirds of the Members present approve at least one article of impeachment. Motions to reconsider any vote on an article of impeachment are not considered to be in order.<sup>109</sup>

Judges convicted of impeachable offenses are subject only to “removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.”<sup>110</sup> Historically, the Senate has voted on whether the judge should be removed or removed and disqualified following separate votes on the articles of impeachment.<sup>111</sup> Since the trial of Judge Halsted Ritter in 1936, however, the penalty of removal has been considered to flow from conviction on at least one article of impeachment. Thus, in modern practice, a separate vote on removal of the convicted judge from office is not necessary.<sup>112</sup>

If the Senate considers a judgment of disqualification of a convicted judge from holding future federal office, a separate vote is necessary, however.<sup>113</sup> The Senate’s decision to remove a judge

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<sup>106</sup> *Sine die* literally translates to “without day.” Thus the expression is used to indicate the final adjournment of a chamber at the end of a Congress. U.S. Senate, “Glossary: ‘adjournment sine die,’” [http://www.senate.gov/reference/glossary\\_term/adjournment\\_sine\\_die.htm](http://www.senate.gov/reference/glossary_term/adjournment_sine_die.htm).

<sup>107</sup> *Cannon’s Precedents*, §512, p. 707. Voting on the articles of impeachment also took place in open session in the impeachment trials of President Andrew Johnson, former Secretary of War William Belknap, and President William Clinton. In the impeachment trial of Senator William Blount, the impeachment was dismissed upon a determination by the Senate that it lacked jurisdiction.

<sup>108</sup> Rule XXIII, *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*.

<sup>109</sup> Rule XXIII, *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*.

<sup>110</sup> U.S. Constitution, Art. I, Sec. 3, Cl. 7.

<sup>111</sup> *Hinds’ Precedents*, vol. III, §§2341, 2397, pp. 710, 819; *Cannon’s Precedents*, vol. VI, §512, p. 708.

<sup>112</sup> During the discussion of whether submitting two orders – one for removal, one for disqualification – was necessary, the Presiding Officer ruled that “no vote was required on the order, removal automatically following conviction for high crimes and misdemeanors under section 4 of article II of the U.S. Constitution.” *Deschler’s Precedents*, Ch. 14, §18, pp. 2244-2245.

<sup>113</sup> See, for example, the discussion of the whether a motion to both remove and disqualify was a “double question” following the conviction of Judge West Humphreys in 1862. If such a motion were determined to be a “double question,” then disqualification would be deemed to flow automatically from removal. The Senate voted, however, that a motion to remove and disqualify was a divisible proposition. In this case, separate votes were taken on the questions of removal and disqualification. The Senate voted unanimously to remove and disqualify Judge Humphreys. *Hinds’ Precedents*, vol. III, §2397, pp. 819-820.



does not imply a decision to disqualify that judge from holding future office. Unlike conviction on an article of impeachment, disqualification requires only a majority vote.<sup>114</sup>

Of the 11 impeached judges tried on the merits by the Senate, 7 have been convicted of at least one article against them. Senators proposed, in three instances, to additionally disqualify the convicted judge from holding a position of public trust in the future; the Senate voted affirmatively in two of these instances.<sup>115</sup> In the last three of these judicial impeachments in which a conviction occurred, the Presiding Officer immediately ordered the judgment to be entered following the vote on the final article of impeachment without the Senate having considered whether disqualification would be appropriate.<sup>116</sup> Finally, Rule XXIII provides, “Upon pronouncing judgment, a certified copy of such judgment shall be deposited in the office of the Secretary of State.”

## Length of Senate Impeachment Trials

Since 1789, the House of Representatives has impeached 15 judges. Of the 15 judges impeached by the House, the Senate has completed trials of 12. Three judges resigned after the Senate had organized for trial but before votes could be taken on the articles of impeachment.<sup>117</sup>

The length of the 12 impeachment trials completed against judges by the Senate has varied widely over time (see **Table 1**). The duration of a Senate impeachment trial is calculated as the number of days elapsed from the first time the Senate organized as a Court of Impeachment to receive the House managers to the date of the Senate vote on the final article of impeachment, including any days the Senate may have been in recess.

Since the first such trial in 1804, the shortest completed trial has been that of Charles Swayne, district court judge for the Northern District of Florida, which took 34 days, or a little more than a month. The longest, that of Alcee Hastings, district court judge for the Southern District of Florida, lasted 437 days, or roughly 14 months and 11 days. Unlike Judge Swayne, Judge Hastings’s trial included an impeachment trial committee authorized under Rule IX of the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*. Both Judge Hastings and Judge Nixon challenged the use of the Rule XI committee as inconsistent with the constitutional provision that the Senate has the “sole Power to try all Impeachments.”<sup>118</sup> Judge

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<sup>114</sup> *Procedure and Guidelines for Impeachment Trials in the United States Senate*, p. 81.

<sup>115</sup> The Senate voted to disqualify Judge West Humphries (1862) and Judge Robert Archbald (1912) from holding office in the future. The lone instance in which a resolution to disqualify a convicted judge failed occurred in 1936, following the conviction of Judge Halsted Ritter, on a unanimous (0-76) vote.

<sup>116</sup> After two-thirds of the Senate found Judge Nixon guilty of the first two articles of impeachment against him, the Presiding Officer directed that the following judgment be entered: “The Senate having tried Walter L. Nixon, Jr., U.S. district judge for the Southern District of Mississippi, upon three articles of impeachment exhibited against him by the House of Representative, and two-thirds of the Senators present having found him guilty of the charges contained in articles I and II of the articles of impeachment, it is, therefore, ordered and adjudged that the said Walter L. Nixon, Jr., be, and he is hereby, removed from office.” No Senator proposed a resolution or order that Nixon also be disqualified. Proceedings in the Senate, “Impeachment of Judge Walter L. Nixon, Jr.,” *Cong. Rec.*, 101<sup>st</sup> Cong., 1<sup>st</sup> sess., November 3, 1989, p. S14636.

<sup>117</sup> These judges were district court judges Mark Delahay (1873, Kansas), George English (1925, Eastern District of Illinois), and Samuel B. Kent (2009, Southern District of Texas).

<sup>118</sup> See *Nixon v. United States*, 506 U.S. 224 (1993), *affirming* 938 F.2d 239 (D.C. Cir. 1991), *affirming* 744 F. Supp. 9 (D.D.C. 1990); *Hastings v. United States*, 802 F. Supp. 490 (D.D.C. 1992), *vacated and remanded on court’s own motion*, 988 F.2d 1280 (Table Case), 300 U.S. App. D.C. 322, 1993 U.S. App. LEXIS 11592 (1993), 1993 WL 81273, *dismissed*, 837 F. Supp. 3 (D.D.C. 1993). See also, *Hastings v. United States Senate*, 716 F. Supp. 38 (D.D.C. 1989), *affirmed*, 887 F.2d 332 (Table Case), 281 U.S. App. D.C. 104, 1989 WL 122685 (D.C. Cir. 1989); *Nixon v. United*

Hastings contended in the Senate and in federal court that “impeachment hearing [by the Rule XI committee] is procedurally flawed.” The use of the Rule XI committee, Judge Hastings argued, would deny him due process and result in a violation of Article I, Section 3, of the U.S. Constitution.<sup>119</sup> Although the Supreme Court ultimately ruled in the Nixon case that the constitutional language pertaining to the Senate trial foreclosed a court challenge to the procedures that could be used by the Senate,<sup>120</sup> legal challenges to the use of a Rule XI committee resulted in a delay of the Hastings impeachment trial.<sup>121</sup>

The average length of all Senate impeachment trials is 144 days, or about four months and three and a half weeks. The average, or mean, is calculated as the sum of the duration of each trial, divided by the number of trials. The average length of Senate trials may portray an inaccurate picture of the majority of Senate trials, however, if one or a few trials are significantly shorter or longer than the majority of trials. In this case, the average trial duration may be skewed by the fact that Judge Hastings’s trial (437 days) lasted so much longer than any other trial conducted by the Senate. The next longest trial was that of Judge James Peck, whose trial lasted 272 days. Although this trial lasted a little more than nine months, Judge Hastings’s trial was 60.7% longer than Judge Peck’s trial.

An alternate indicator of the length of Senate trials, the median, is calculated as the midpoint of a list of trial lengths that have been ordered by the number of days elapsed from the start of the trial to the final vote. For example, in a list of the 12 full impeachment trials of federal judges in order by trial length, the midpoint between the number of days elapsed during the sixth and seventh trials on that list would be the median. Given that Judge Hastings’s trial was so much longer than the others, the median trial duration of 80 days may be a more accurate indicator of the duration of the majority of Senate impeachment trials to date.<sup>122</sup>

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States Senate, 887 F.2d 332 (D.C. Cir. 1989) (Table Case), 281 U.S. App. D.C. 104 (D.C. Cir. 1989).

<sup>119</sup> *Hastings v. United States Senate*, 716 F. Supp. 38, 39 (D.D.C. 1989).

<sup>120</sup> *Nixon v. United States*, 506 U.S. 224 (1993).

<sup>121</sup> For a more extensive discussion of court rulings on this issue, see Bazan and Lewis, *Impeachment*, pp. 9-12.

<sup>122</sup> The median represents the midpoint between the duration of the trial of Judge Harold Louderback (76 days) and Supreme Court Justice Samuel Chase (84 days).



**Table I. Impeached Judges Tried by the Senate**  
In Chronological Order, with Duration in Days, 1789-Present

No.	Judge	Court	Impeachment	Start of Trial <sup>a</sup>	Votes on Articles	Outcome <sup>b</sup>	Trial Duration <sup>c</sup>
1	John Pickering	Dist. of NH	3/3/1803	1/4/1804	3/12/1804	Convicted	68
2	Samuel Chase	Supreme Court	12/3/1804	12/7/1804	3/1/1805	Acquitted	84
3	James Peck	Dist. of MO	4/24/1830	5/4/1830	1/31/1831	Acquitted	272
4	West Humphreys	W., E., and Mid. Dist. of TN	5/6/1862	5/22/1862	6/26/1862	Convicted <sup>d</sup>	35
5	Charles Swayne	N. Dist. of FL	12/13/1904	1/24/1905	2/27/1905	Acquitted	34
6	Robert Archbald	Commerce Court	7/11/1912	7/15/1912	1/13/1913	Convicted <sup>d</sup>	182
7	Harold Louderback	N. Dist. of CA	2/24/1933	3/9/1933	5/24/1933	Acquitted	76
8	Halsted Ritter	S. Dist. of FL	3/2/1936	3/10/1936	4/17/1936	Convicted	38
9	Harry Claiborne <sup>e</sup>	Dist. of NV	7/22/1986	8/6/1986	10/9/1986	Convicted	64
10	Alcee Hastings <sup>e</sup>	S. Dist. of FL	8/3/1988	8/9/1988	10/20/1989	Convicted	437
11	Walter Nixon <sup>e</sup>	S. Dist. of MS	5/10/1989	5/11/1989	11/3/1989	Convicted	176
12	G. Thomas Porteous, Jr. <sup>e</sup>	E. Dist. of LA	3/11/2010	3/17/2010	12/8/2010	Convicted <sup>d</sup>	266

**Source:** CRS analysis of data found in Hinds' Precedents, vol. III, §§ 2317-2397; Cannon's Precedents, vol. IV, §§ 498-524; Deschler's Precedents, vol. III, §§ 17-18; and Legislative Information System (LIS) database.

**Notes:** Of the eight judges convicted, all were removed from their positions. Two were also disqualified from holding future office.

- The beginning of the Senate trial is counted as the day on which the Senate first formed itself as a Court of Impeachment to hear the articles presented by House managers.
- For an impeached judge to have been convicted, two-thirds of the Senate must have voted "guilty" on at least one article of impeachment.
- Trial duration is calculated as the number of days elapsed from the beginning of the Senate trial to the Senate's final vote on the articles of impeachment and disqualification, if applicable, including any days that the Senate may have been in recess.
- This judge was also disqualified from holding future office.
- The impeachment trial of this judge included a Rule XI Committee.

As discussed above, prior to the trial of Judge Claiborne in 1986, the Senate organized as a Court of Impeachment in which all Senators were charged with hearing motions, evidence, and arguments by the impeached judge (or his counsel) and the House managers. In other words, eight (66.7%) of the 12 full impeachment trials conducted by the Senate were tried before the full Senate.

**Table 2. Summary of Senate Trial Durations**

In Days, 1789-Present

Senate Trial Conducted by:	Mean	Median	Minimum	Maximum
Full Senate (N=8)	99	72	34	272
Rule XI Committee (N=4)	236	221	64	437
<b>All Outcomes (N=12)</b>	<b>144</b>	<b>80</b>	<b>34</b>	<b>437</b>

**Source:** CRS analysis of data found in Hinds' Precedents, vol. III, §§ 2317-2397; Cannon's Precedents, vol. IV, §§ 498-524; Deschler's Precedents, vol. III, §§ 17-18; and Legislative Information System (LIS) database.

**Notes:** The mean, or average, is calculated as the sum of the duration of each trial, divided by the number of trials. An alternate indicator, the median, is calculated as the midpoint of a list of trial durations that have been ordered by length. For example, in a list of 12 trials that have been ordered by trial duration, the midpoint between the sixth and seventh trials on that list would be the median.

On average, as illustrated in **Table 2**, the three trials conducted by a Rule XI committee lasted significantly longer than trials conducted by the full Senate. This may be a function of several factors. First, as discussed above, the use of the Rule XI committee was challenged by Judge Hastings not only before the Senate, but also in federal court after the Senate had organized for trial, and again after completion of his impeachment trial. Judge Nixon also challenged the Rule XI procedure in federal court both during and after his impeachment trial. Second, the use of Rule XI committees freed the full Senate from having to stop legislative business to conduct the trial. On its face, it might appear that such an innovation would reduce the duration of Senate trials. However, one might argue that because a trial conducted by a Rule XI committee is less obtrusive and presents less of a hindrance to legislative business, it is permitted to last longer than if the business of the Senate had to be stopped to conduct the trial.

Finally, the trials of the 1980s were the first in which the Senate was considering articles of impeachment against a judge who had been subject to a criminal proceeding in a federal court. These prior proceedings added an extra layer of complexity to the Senate trial by presenting thorny constitutional and procedural questions about how to consider evidence or testimony collected during the course of criminal proceedings, whether the Senate's proceedings violated Fifth Amendment guarantees of due process and against double jeopardy, and to what extent a conviction or an acquittal on a criminal charge should be weighed in determining the guilt of the judge with respect to the articles of impeachment.

## Concluding Observations

Judicial impeachment trials in the Senate are rare, in that only 12 full trials have been completed over the 222-year history of the Senate, and unique, in that each trial presents a wholly complex and unique set of facts and circumstances for the Senate's consideration. Thus, although this report may provide guidance as to the general structure of the process, each trial presents new procedural, factual, and evidentiary questions that must be resolved by either the full Senate, acting as a Court of Impeachment, or the Rule XI committee charged with building a trial record.

Since the first judicial impeachment trial in 1804, the largest change to occur in the Senate's proceedings is the advent of the impeachment trial committee, otherwise known as the Rule XI committee. This committee frees the full Senate from a lengthy impeachment trial, during which legislative business is necessarily placed on hold. Although judges tried by the Senate under this system have challenged its constitutionality, the Supreme Court has upheld the constitutional authority of the Senate to structure its proceedings.

Over the past three impeachment trials of judges, members of the Rule XI committees have established procedures and practices designed to create fair proceedings that accommodate the requests of both House managers and the impeached judge. As a by-product of the Senate's efforts to ensure fairness, the role of outside counsel for both the House managers and the impeached judge increased during the 1980s. Prior to the Claiborne impeachment trial in 1986, outside counsel played a minimal role in impeachment trial proceedings. During impeachment trials in the 1980s, however, one scholar has observed that

counsel performed much of the bread and butter litigation work, including the conduct of depositions, the drafting of briefs and motions (subject to the approval of the managers), the interviewing of witnesses and in some cases, even the cross examination of witnesses during the trial itself. The managers' presence may have added a degree of formality and credibility to the Senate trial forum, but, for most portions of the 1980s Senate trial committee proceedings, the managers were primarily observers.<sup>123</sup>

Given the establishment of various precedents and rules discussed in this report, as well as the established constitutionality of the Rule XI committee itself, it is possible that future Senate trials utilizing Rule XI trials may be of shorter duration than those occurring in the 1980s. However, improvements in efficiency will depend on the ability of future Senators and committee staff to utilize and learn from the work of previous committees. To further this end, the records of each committee are archived with the National Archives and Records Administration and are available for the use of future committees.

However, the length of the trial is dependent not only on the ability of staff to efficiently perform its work, but also the growing litigious nature of impeachment trials. Although impeachment trials have always been characterized by a quasi-judicial character, impeachment trials in the modern era, as conducted by impeachment trial committees, have increasingly resembled complex civil trials, requiring, among other things: document production from executive agencies, such as the Department of Justice; an agreement with respect to stipulations of fact by the parties; and a formal hearing on any pre-trial motions that the parties care to offer. The lengthening of this process, caused by its increasingly "litigation-like" nature, while not ideal, may be tolerable due to the Senate's inherent interest in preserving an appropriate level of due process. Additionally, by using a Rule XI committee, the Senate is able to both ensure that the impeached judge receives a fair hearing while, at the same time, not burdening the full Senate with a lengthy and cumbersome process.

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<sup>123</sup> Grimes, *The Role of the United States House of Representatives in Proceedings to Impeach and Remove Federal Judges*, p. 65.

# **Appendix A. H. Res. 1031, Articles of Impeachment Against Judge G. Thomas Porteous**

## **H.RES.1031**

111<sup>th</sup> CONGRESS

2d Session

**H. RES. 1031**

**IN THE SENATE OF THE UNITED STATES**

**March 11, 2010**

### **RESOLUTION**

Impeaching G. Thomas Porteous, Jr., judge of the United States District Court for the Eastern District of Louisiana, for high crimes and misdemeanors.

*Resolved*, That G. Thomas Porteous, Jr., a judge of the United States District Court for the Eastern District of Louisiana, is impeached for high crimes and misdemeanors, and that the following articles of impeachment be exhibited to the Senate:

Articles of impeachment exhibited by the House of Representatives of the United States of America in the name of itself and all of the people of the United States of America, against G. Thomas Porteous, Jr., a judge in the United States District Court for the Eastern District of Louisiana, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

### **Article I**

G. Thomas Porteous, Jr., while a Federal judge of the United States District Court for the Eastern District of Louisiana, engaged in a pattern of conduct that is incompatible with the trust and confidence placed in him as a Federal judge, as follows:

Judge Porteous, while presiding as a United States district judge in *Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enterprises*, denied a motion to recuse himself from the case, despite the fact that he had a corrupt financial relationship with the law firm of Amato & Creely, P.C. which had entered the case to represent Liljeberg. In denying the motion to recuse, and in contravention of clear canons of judicial ethics, Judge Porteous failed to disclose that beginning in or about the late 1980s while he was a State court judge in the 24<sup>th</sup> Judicial District Court in the State of Louisiana, he engaged in a corrupt scheme with attorneys, Jacob Amato, Jr., and Robert Creely, whereby Judge Porteous appointed Amato's law partner as a "curator" in hundreds of cases and thereafter requested and accepted from Amato & Creely a portion of the curatorship fees which had been paid to the firm. During the period of this scheme, the fees received by Amato & Creely amounted to approximately \$40,000, and the amounts paid by Amato & Creely to Judge Porteous amounted to approximately \$20,000.

Judge Porteous also made intentionally misleading statements at the recusal hearing intended to minimize the extent of his personal relationship with the two attorneys. In so doing, and in failing to disclose to Lifemark and its counsel the true circumstances of his

relationship with the Amato & Creely law firm, Judge Porteous deprived the Fifth Circuit Court of Appeals of critical information for its review of a petition for a writ of mandamus, which sought to overrule Judge Porteous's denial of the recusal motion. His conduct deprived the parties and the public of the right to the honest services of his office.

Judge Porteous also engaged in corrupt conduct after the *Lifemark v. Liljeberg* bench trial, and while he had the case under advisement, in that he solicited and accepted things of value from both Amato and his law partner Creely, including a payment of thousands of dollars in cash. Thereafter, and without disclosing his corrupt relationship with the attorneys of Amato & Creely PLC or his receipt from them of cash and other things of value, Judge Porteous ruled in favor of their client, Liljeberg.

By virtue of this corrupt relationship and his conduct as a Federal judge, Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for, and confidence in, the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge.

Wherefore, Judge G. Thomas Porteous, Jr., is guilty of high crimes and misdemeanors and should be removed from office.

## **Article II**

G. Thomas Porteous, Jr., engaged in a longstanding pattern of corrupt conduct that demonstrates his unfitness to serve as a United States District Court Judge. That conduct included the following: Beginning in or about the late 1980s while he was a State court judge in the 24<sup>th</sup> Judicial District Court in the State of Louisiana, and continuing while he was a Federal judge in the United States District Court for the Eastern District of Louisiana, Judge Porteous engaged in a corrupt relationship with bail bondsman Louis M. Marcotte, III, and his sister Lori Marcotte. As part of this corrupt relationship, Judge Porteous solicited and accepted numerous things of value, including meals, trips, home repairs, and car repairs, for his personal use and benefit, while at the same time taking official actions that benefitted the Marcottes. These official actions by Judge Porteous included, while on the State bench, setting, reducing, and splitting bonds as requested by the Marcottes, and improperly setting aside or expunging felony convictions for two Marcotte employees (in one case after Judge Porteous had been confirmed by the Senate but before being sworn in as a Federal judge). In addition, both while on the State bench and on the Federal bench, Judge Porteous used the power and prestige of his office to assist the Marcottes in forming relationships with State judicial officers and individuals important to the Marcottes' business. As Judge Porteous well knew and understood, Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench.

Accordingly, Judge G. Thomas Porteous, Jr., has engaged in conduct so utterly lacking in honesty and integrity that he is guilty of high crimes and misdemeanors, is unfit to hold the office of Federal judge, and should be removed from office.

## **Article III**

Beginning in or about March 2001 and continuing through about July 2004, while a Federal judge in the United States District Court for the Eastern District of Louisiana, G. Thomas Porteous, Jr., engaged in a pattern of conduct inconsistent with the trust and

confidence placed in him as a Federal judge by knowingly and intentionally making material false statements and representations under penalty of perjury related to his personal bankruptcy filing and by repeatedly violating a court order in his bankruptcy case. Judge Porteous did so by—

- (1) using a false name and a post office box address to conceal his identity as the debtor in the case;
- (2) concealing assets;
- (3) concealing preferential payments to certain creditors;
- (4) concealing gambling losses and other gambling debts; and
- (5) incurring new debts while the case was pending, in violation of the bankruptcy court's order.

In doing so, Judge Porteous brought his court into scandal and disrepute, prejudiced public respect for and confidence in the Federal judiciary, and demonstrated that he is unfit for the office of Federal judge.

Wherefore, Judge G. Thomas Porteous, Jr., is guilty of high crimes and misdemeanors and should be removed from office.

## **Article IV**

In 1994, in connection with his nomination to be a judge of the United States District Court for the Eastern District of Louisiana, G. Thomas Porteous, Jr., knowingly made material false statements about his past to both the United States Senate and to the Federal Bureau of Investigation in order to obtain the office of United States District Court Judge. These false statements included the following:

- (1) On his Supplemental SF-86, Judge Porteous was asked if there was anything in his personal life that could be used by someone to coerce or blackmail him, or if there was anything in his life that could cause an embarrassment to Judge Porteous or the President if publicly known. Judge Porteous answered 'no' to this question and signed the form under the warning that a false statement was punishable by law.
- (2) During his background check, Judge Porteous falsely told the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, or compromise him in any way or that would impact negatively on his character, reputation, judgment, or discretion.
- (3) On the Senate Judiciary Committee's "Questionnaire for Judicial Nominees," Judge Porteous was asked whether any unfavorable information existed that could affect his nomination. Judge Porteous answered that, to the best of his knowledge, he did 'not know of any unfavorable information that may affect [his] nomination'. Judge Porteous signed that questionnaire by swearing that 'the

information provided in this statement is, to the best of my knowledge, true and accurate’.

However, in truth and in fact, as Judge Porteous then well knew, each of these answers was materially false because Judge Porteous had engaged in a corrupt relationship with the law firm Amato & Creely, whereby Judge Porteous appointed Creely as a “curator” in hundreds of cases and thereafter requested and accepted from Amato & Creely a portion of the curatorship fees which had been paid to the firm and also had engaged in a corrupt relationship with Louis and Lori Marcotte, whereby Judge Porteous solicited and accepted numerous things of value, including meals, trips, home repairs, and car repairs, for his personal use and benefit, while at the same time taking official actions that benefitted the Marcottes. As Judge Porteous well knew and understood, Louis Marcotte also made false statements to the Federal Bureau of Investigation in an effort to assist Judge Porteous in being appointed to the Federal bench. Judge Porteous’s failure to disclose these corrupt relationships deprived the United States Senate and the public of information that would have had a material impact on his confirmation.

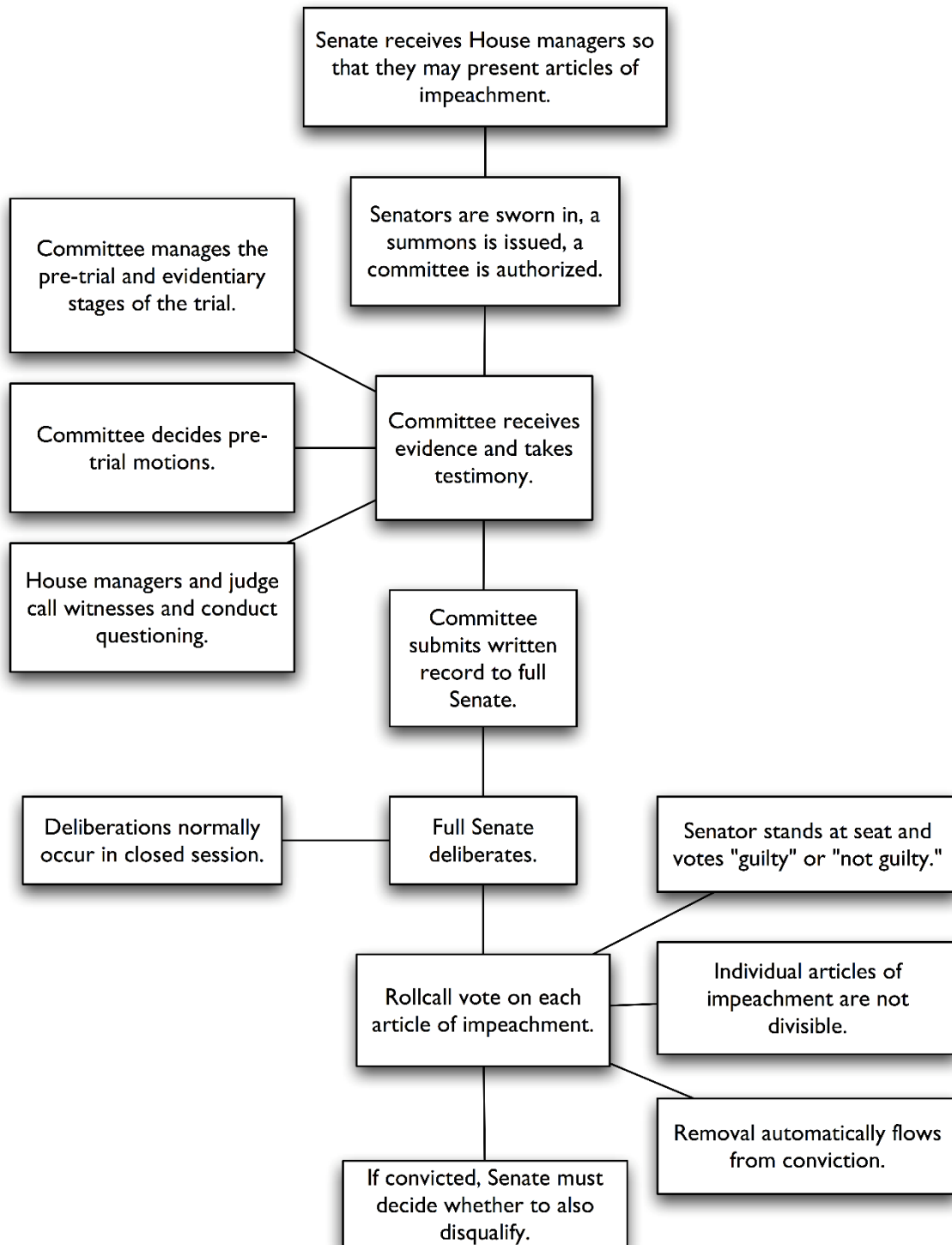
Wherefore, Judge G. Thomas Porteous, Jr., is guilty of high crimes and misdemeanors and should be removed from office.

NANCY PELOSI,  
Speaker of the House of Representatives.

Attest:  
LORRAINE C. MILLER,  
Clerk.



## Appendix B. Chart of the Senate Impeachment Trial Process



## **Author Information**

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